



Citation: *Minister of Employment and Social Development v RS*, 2024 SST 1147

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Minister of Employment and Social Development  
**Representative:** Rebekah Ferriss

**Respondent:** R. S.  
**Representative:** Frank Van Dyke

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**Decision under appeal:** General Division decision dated March 12, 2024  
(GP-23-1305)

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**Tribunal member:** Neil Nawaz

**Type of hearing:** Videoconference

**Hearing date:** September 16, 2024

**Hearing participants:** Appellant's representative  
Respondent  
Respondent's representative

**Decision date:** September 24, 2024

**File number:** AD-24-406

## Decision

[1] The appeal is allowed. The Respondent is not entitled to an extension of time to request reconsideration of his Canada Pension Plan (CPP) disability claim.

## Overview

[2] The Respondent is a 62-year-old former small business owner with a history of heart disease. In October 2012, he went to the hospital for an angiogram. When he was injected with catheterization dye, he suffered an allergic reaction and went into cardiac arrest. He hasn't worked since.

[3] The Respondent applied for a CPP disability pension in July 2013.<sup>1</sup> He claimed that he could no longer work because of weakness in his right leg, resulting in impaired mobility and endurance, as well as secondary ischemia from a medical procedure. In February 2014, the Minister's public-facing agency, Service Canada, refused the application after determining that the Respondent didn't have a "severe and prolonged" disability.<sup>2</sup>

[4] More than eight years went by. On December 7, 2022, the Respondent asked Service Canada to reconsider its decision not to grant him the disability pension. Service Canada refused the request, since it came long after the statutory deadlines.<sup>3</sup>

[5] The Respondent appealed Service Canada's refusal to this Tribunal's General Division. He said that he was unsure whether he had ever received Service Canada's initial refusal letter. He added that, if he did receive it, he was heavily medicated on strong narcotics and unable to understand or respond to it. He also said that, because of a medical accident, he had an acquired brain injury and had difficulty with processes involving multiple steps.

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<sup>1</sup> See the Respondent's CPP disability application date stamped July 4, 2013, GD2-216.

<sup>2</sup> See Service Canada's initial refusal letter dated February 8, 2014, GD2-29. CPP disability claimants must show that they have a severe and prolonged disability in accordance with the definitions set out in section 42(2)(a) of the *Canada Pension Plan*.

<sup>3</sup> See Service Canada's reconsideration refusal letter dated February 8, 2014, GD2-14.

[6] The General Division held a hearing by videoconference and allowed the appeal. It found that the Minister had not handled the Respondent's request for an extension of time in a judicial manner. It then took its own look at the surrounding circumstances and decided that the Respondent's disability claim warranted reconsideration, even though his request to do so came eight years late.

[7] The Minister didn't agree with this decision. He went to the Appeal Division alleging that the General Division had made errors of law, and one of my colleagues granted him permission to appeal. Earlier this month, I held a new hearing to discuss the Respondent's attempt to revive his disability claim.

[8] Now that I have considered submissions from both parties, I have concluded that the Minister failed to judicially consider the Respondent's request to extend the reconsideration deadline. However, having looked at all the facts and circumstances, I don't agree that the Respondent should be allowed more time to ask for his claim to be reconsidered.

## **Issues**

[9] In this appeal, I had to decide the following questions:

- Was the Respondent's request for reconsideration was late?
- If the request was late, did the Minister act judicially when it refused to give the Respondent more time to ask for reconsideration?
- If the Minister didn't act judicially, should the Respondent get more time to ask for reconsideration?

## **Analysis**

[10] I have applied the law to the available evidence and concluded that the Minister didn't deal with the Respondent's late reconsideration request in the appropriate manner. However, my own review of the record satisfies me that the Minister is not obliged to reconsider his decision to deny the Respondent disability benefits.

## **The Respondent's request for reconsideration was late**

[11] According to the *Canada Pension Plan*, a person who disagrees with the Minister's initial refusal of their disability application has 90 days to ask the Minister to reconsider that refusal. If a person waits more than 90 days after they were notified of the refusal in writing, then their request is late.<sup>4</sup>

[12] In this case, the Respondent's request for reconsideration was late. The Respondent was notified of the Minister's decision to refuse his CPP disability application by way of a letter dated February 8, 2014.<sup>5</sup> The Respondent has said that he isn't sure whether he ever received the letter, but a note by his family doctor suggests that he probably did. On April 1, 2014, Dr. Overington wrote, "R. wonders about CPP application. I think he should appeal, and I will write a letter of support for him."<sup>6</sup>

[13] Dr. Overington did write a draft letter of support for the Respondent, although Service Canada denies ever receiving it. There is nothing on the record until December 7, 2022, when the Minister received the Respondent's request for reconsideration.<sup>7</sup>

[14] I am satisfied that the Respondent didn't make his reconsideration request until more than eight years after the 90-day deadline.

## **The Minister didn't consider the Respondent's extension request in a judicial manner**

### **– The Minister must follow legislative and judicial guidelines when it exercises discretion**

[15] The Minister has two types of power: mandatory and discretionary. The first describes things the Minister must do under the law; the second describes things that

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<sup>4</sup> See section 81(1) of the *Canada Pension Plan* and section 74.1 of the *Canada Pension Plan Regulations* (CPR).

<sup>5</sup> See Service Canada's initial refusal letter dated February 8, 2014, GD2-29.

<sup>6</sup> See office note dated April 1, 2014 by Dr. Nancy Overington, family physician, GD16-3.

<sup>7</sup> See the Respondent's request for reconsideration dated November 27, 2022 and received December 7, 2022, GD2-18.

are optional — powers the Minister can use if he wants to but doesn't necessarily have to.

[16] Even for discretionary powers, the Minister cannot simply do whatever he feels like doing. The law requires the Minister to exercise such powers in a judicial manner. This means that when someone asks the government for something, the Minister owes it to them to take their request seriously, to listen to what they are saying, and to weigh relevant information in an attempt to come to a fair decision.

[17] The courts have defined what it means to exercise discretionary power judicially.<sup>8</sup> The Federal Court has held that a discretionary power is not exercised judicially if the decision-maker:

- acted in bad faith;
- acted for an improper purpose or motive;
- took into account an irrelevant factor;
- ignored a relevant factor; or
- acted in a discriminatory manner.<sup>9</sup>

[18] Among the Minister's many discretionary powers is the power to grant an extension when a claimant misses a filing deadline. As noted, a person who disagrees with the Minister's initial refusal of their disability application has 90 days to ask the Minister to reconsider that refusal.<sup>10</sup>

[19] Under section 74.1 of the *Canada Pension Plan Regulations* (CPPR), the Minister may allow a longer period to request reconsideration if he is satisfied that the following criteria are met:

- (i) There is a reasonable explanation for requesting a longer period and

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<sup>8</sup> *Canada (Attorney General) v Uppal*, 2008 FCA 388.

<sup>9</sup> *Canada (Attorney General) v Purcell*, [1996] 1 FCR 644.

<sup>10</sup> CPP, section 81(1).

- (ii) The claimant has demonstrated a continuing intention to request a reconsideration.<sup>11</sup>

[20] If the request for reconsideration is made more than 365 days after the initial refusal, the Minister must also be satisfied that two more criteria are met:

- (iii) The request for reconsideration has a reasonable chance of success and
- (iv) No prejudice would be caused to any party by allowing a longer period to make the request.<sup>12</sup>

[21] In this case, the Respondent's request for reconsideration came more than 365 days after the Minister turned down his disability application. In considering that request, the Minister was required to exercise his discretionary power judicially while applying **all four** of the criteria listed above.

#### – The Minister misapplied the third condition

[22] I see an indication that the Minister applied the wrong standard when considering whether the Respondent's request for reconsideration had a reasonable chance of success. In the Respondent's case, a Service Canada adjudicator used a worksheet that set out the four criteria listed in section 74.1 of the CPPR. The worksheet came with guidelines that defined "reasonable chance of success" as follows:

A reasonable chance of success exists when the decision to deny benefits is disputable, debatable, or open to question. Generally, a person must supply additional evidence to support their reconsideration request. If no new information is provided or any reasons given why the decision was incorrect, there is no reasonable chance of success.<sup>13</sup>

[23] It is not clear that this guideline reflects the law. For instance, the *Canada Pension Plan* does not require a claimant seeking reconsideration to supply additional

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<sup>11</sup> See CPPR, section 74.1(3).

<sup>12</sup> See CPPR, section 74.1(4).

<sup>13</sup> See Service Canada's late consideration request worksheet completed by M. Sparnaay on February 22, 2023, GD2-9.

evidence; it only requires that the claimant be “dissatisfied” with the Minister’s initial decision. That said, a “reasonable chance of success” is often equated with having an arguable case, and it is safe to say that a case must have at least some merit before the Minister can take a second look.<sup>14</sup>

[24] In her analysis, the Minister’s adjudicator offered this brief assessment of the Respondent’s case:

Given the length of delay, it is arguable that the Minister would not be able adequately to reconsider the applicant’s application dated 2013-07-04 for CPPD benefit. Although the applicant submitted new evidence with his request on 2022-12-07, this evidence is dated well past the expiration of the defined time to seek reconsideration.<sup>15</sup>

[25] I don’t see how the “length of the delay” prevented the Minister from making at least some kind of assessment of the Respondent’s case. The Respondent’s disability claim, whatever its merits, remained much the same as it was eight years previously. His minimum qualifying period had not changed. His medical records were still on file and available for inspection. The adjudicator’s sole focus was on the Respondent’s new evidence, which, because it was recent, she assumed had little relevance. That may be so, but section 74.1 of the CPPR requires consideration of a claimant’s **entire** claim, which in turn requires an assessment of **all** the available evidence — not just new evidence.

[26] The Minister applied an inappropriately narrow standard in assessing whether the Respondent’s case had a reasonable chance of success. For that reason, I am satisfied that the Minister failed to exercise his discretion judicially.

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<sup>14</sup> *Fancy v Canada (Attorney General)*, 2010 FCA 63.

<sup>15</sup> See Service Canada’s late consideration request worksheet, GD2-10.

## **The Respondent should not get more time to request reconsideration**

[27] Because the Minister misapplied one of the criteria in section 74.1 of the CPPR, I now have to decide whether the Respondent should have more time to ask for reconsideration. When I do this, I must consider the same four criteria that the Minister had to consider. For the following reasons, I am not satisfied that the Respondent met all four of those criteria.

### **– The Respondent did not offer a reasonable explanation for being late**

[28] The Respondent says that he didn't respond to the Minister's initial refusal letter dated February 8, 2014 for the following reasons:

- He sustained a brain injury that interfered with his memory and his powers of concentration; and
- He assumed that his family physician would be requesting reconsideration on his behalf.

[29] I don't find these explanations reasonable. There is no doubt that the Respondent had a heart attack during his October 2012 angiogram, but I don't see evidence that it led to a **debilitating** brain injury:

- When the Respondent was discharged from hospital in December 2012, the attending physician documented how a catheter was placed in his right femoral artery rather than his vein, leading to anaphylaxis (allergic reaction), acute renal (kidney) failure, and ischemia (reduced blood flow leading to oxygen deprivation) in his right leg.<sup>16</sup> The Respondent was transferred to X (X) acquired brain injury unit.
- In January 2013, a psychiatric resident noted that the Respondent was experiencing significant emotional difficulty resulting from his surgery and complications. The Respondent said that he was also worried about a

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<sup>16</sup> See discharge report dated December 7, 2012 by Dr. Brendan Parfrey, cardiologist, GD2-149.



possible acquired brain injury, although the resident was **“unable to find note of this on the patient's chart.”**<sup>17</sup>

- Later that month, cognitive and psychological testing revealed moderate depression and anxiety and **average to superior performance with executive functioning**, with a few aspects falling in the low average range, suggestive of possible **mild inefficiencies in learning and self-monitoring.**<sup>18</sup>
- On discharge from X, the attending physician noted that the Respondent was admitted for rehab **“supposedly for brain injury but cognitively he is quite well** and most of his stay focused around attention to his lower limb wound,” which was “nicely healing.”<sup>19</sup>
- In January 2014, the Respondent was again examined at the X acquired brain injury clinic. A rehabilitation specialist noted that the Respondent continued to have right leg pain and was ambulating with the help of crutches and a walking boot. He scored **29/30 on the Montreal Cognitive Assessment (MoCA): “Cognitively, he reports that he is doing okay** although still gets distracted and unable to do multitasking. He states that he loses track of what he is doing in noisy environment or when involves in loud conversations.”<sup>20</sup>

[All emphases above added]

[30] In all, the available medical evidence indicates that the Respondent has had longstanding heart problems and, as a result of a medical mishap, leg dysfunction. He has also been moderately depressed and anxious, but I see no indication of cognitive deficits that would explain why he submitted his reconsideration request eight years

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<sup>17</sup> See report dated January 23, 2013 by Dr. Peter Walker, psychiatric resident for Dr. R. Jokic, GD2-154.

<sup>18</sup> See psychology assessment report dated June 13, 2013 by Dr. Elizabeth Minerva Moore, clinical psychologist, GD2-74.

<sup>19</sup> See inpatient discharge summary dated February 6, 2013 by Dr. Louis Kennedy, GD2-160.

<sup>20</sup> See report dated January 12, 2014 by Dr. Sussan Askari, specialist in physical and rehabilitation medicine, GD2-119.

after the deadline. There is no evidence of a brain injury, and the Respondent has never seen a neurologist. The Respondent experiences some difficulty in concentrating, but that would not reasonably explain the long delay in submitting the required paperwork.

[31] The Respondent's failure to submit a reconsideration request within a reasonable time is all the more inexplicable when I look at other aspects of his life.

- The Respondent is a university graduate with a varied work history that has included stints as a farmer, consultant, and entrepreneur.<sup>21</sup> It is reasonable to assume that he has experience in dealing with large bureaucratic organizations, including the government.
- In the years following his medical incident, the Respondent did many things that suggested he had agency and initiative: he purchased a home, he sought medical treatment, and he pursued medical malpractice litigation.
- Constance Howes, a church minister, testified that, when she first met the Respondent in 2018, he was living in an isolated, cluttered house that required extensive cleaning. However, she conceded that he was living independently at the time and was not subject to a power of attorney or any other substitute decision-maker.<sup>22</sup>

[32] Ms. Howes also testified that the Respondent was heavily reliant on others to look after his interests. She said that, although the Respondent sued the doctors who botched his catheterization, it was his former girlfriend who spearheaded the lawsuit. However, the Respondent himself must have approved the hiring of a law firm and the decision to initiate litigation. The lawsuit was eventually settled, and it was the Respondent who, acting on his own behalf, approved the settlement.<sup>23</sup> I find it unlikely that a law firm would have taken instructions from someone who appeared incapable.

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<sup>21</sup> See Dr. Walker's report of January 23, 2013, GD2-154.

<sup>22</sup> Ms. Howes is now the Respondent's attorney for property and personal care, but she testified that he didn't grant her that power until June 2024.

<sup>23</sup> At the hearing before me, the Respondent testified that he agreed to the settlement offer. Refer to the hearing recording from 1:15 to 1:18.

[33] I also find it notable that both the Respondent's October 2013 CPP disability application and his family doctor's accompanying medical questionnaire, focused on physical, rather than mental or emotional, impairments.<sup>24</sup> It is true that, amid complaints of limited strength and endurance, the Respondent disclosed problems with his short-term memory and ability to concentrate. However, it is difficult to conceive how such impairments would explain how the Respondent neglected his disability claim for more than eight years.

[34] In sum, there is insufficient evidence that the Respondent had mental or psychological impairments that would have prevented him from understanding and following instructions about how to request reconsideration of his CPP disability application. Having considered the Respondent's life and medical problems over the period from 2012 to 2022, I don't see a reasonable explanation for the delay.

– **The Respondent didn't have a continuing intention to ask for reconsideration**

[35] The Respondent's request for an extension must be refused if only one of the four factors listed in section 74.1 of the CPPR goes against him. Although it is not necessary for me to do so, I will also consider the second factor, which, in this case, is linked to the first.

[36] The Respondent maintains that he had good reason to assume his family physician, Dr. Overington, would make the reconsideration request on his behalf. He points to her April 2014 clinical note ("I will write a letter of support for him"), as well as the fact that she prepared a draft that was apparently never sent.<sup>25</sup> I accept that this assumption, although wrong, accounted for a portion of the delay — many CPP disability applicants find the claims process confusing, and one can easily imagine the Respondent mistaking a letter from Dr. Overington for a formal reconsideration request.

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<sup>24</sup> See the Respondent's CPP disability application (GD2-38) and questionnaire (GD2-164), both date-stamped October 10, 2013. Also see the CPP medical report completed on April 22, 2013 by Dr. Lindsay Warder, locum for Dr. Nancy Overington, family physician, GD2-144. Dr. Warder's report lists the Respondent's main medical diagnoses as coronary artery disease and complications from his botched angiogram, including cardiac arrest, leg thrombosis, and renal failure. There is a brief mention of depression but otherwise nothing that would account for a lengthy delay in following up on an application for benefits.

<sup>25</sup> See Dr. Overington's office note dated April 1, 2014, GD16-3.

However, such a mistake does not adequately explain why it took the Respondent eight years to follow up.

[37] There is no evidence that the Respondent ever contacted Service Canada to inquire about his application status. There is no evidence that the Respondent ever asked Dr. Overington, who he supposedly believed was “handling” his claim, whether she had received a response to the reconsideration request. There is nothing to indicate that Dr. Overington’s retirement in 2016 prompted the Respondent to find out whatever became of his disability claim.<sup>26</sup>

[38] As discussed, the extent of the Respondent’s mental and psychological conditions are **self-reported** short-term memory problems and an inability to multitask. Even if they were corroborated by the medical evidence, these relatively commonplace problems would not explain why it took the Respondent so long to make a reconsideration request. Instead, there is every indication that, after assuming Dr. Overington would take care of the reconsideration request in early 2014, the Respondent simply forgot about his disability claim.

[39] It appears that Ms. Howes revived the Respondent’s interest in receiving the CPP disability pension, but she didn’t meet him until 2018, and he didn’t formally request reconsideration until December 2022. Even with Ms. Howes’ encouragement and assistance, there was still a delay of up to four more years.

[40] None of this history suggests a “continuing intention” to request reconsideration.

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<sup>26</sup> In a CPP medical report completed on February 1, 2023, Dr. Whitney Smith, family physician, said that she took over Dr. Overington’s practice in 2016 — see GD2-207.

## Conclusion

[41] The Appeal is dismissed. The Minister failed to fulfill his obligation under section 74.1 of the CPPR by applying an overly strict standard when assessing whether the Respondent's case had a reasonable chance of success. However, when I reviewed the record myself, I found that the Respondent had not met two of the other criteria for allowing an extension of time to request reconsideration required when more than a year has passed. In particular, I found that the Respondent's explanations for his late request were unreasonable and that he didn't have a continuing intention to make such a request during the preceding eight years.

[42] I regret having to block the Respondent's attempt to revive his disability application on a procedural issue. However, Parliament enacted a detailed set of rules to govern late reconsideration requests, and they must be followed attentively. I understand that the Respondent believes his explanation for the eight-year delay was reasonable, but the facts and circumstances around that delay led me to believe otherwise. A claimant's subjective view of what's reasonable can't be the deciding factor when determining whether to waive statutory filing deadlines.

[43] For the above reasons, I am refusing the Respondent's request for an extension of time. His disability claim will not be going forward.



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Member, Appeal Division